IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 215

In re WILLIAM OLIVER

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF FOR DETROIT CHAPTER, NATIONAL LAWYERS GUILD, AMICUS CURIAE

DETROIT CHAPTER,
NATIONAL LAWYERS GUILD,
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President.

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With the consent of the parties, the following brief is submitted by the Detroit Chapter of the National Lawyers Guild, as *amicus curiae*. This organization of Michigan lawyers is vitally interested in the protection of civil rights in investigations under the so-called "one-man grand jury" statute, which is involved in the case at bar.

OPINION BELOW

The circuit judge for the County of Oakland who sentenced petitioner for contempt gave his reasons orally and later amplified them in his return (R. 8).* The opinions of the Supreme Court of Michigan, upon petitions for writs of habeas corpus and certiorari, affirming the conviction by an equally divided court, are reported in 318 Mich. 7 (1947).

JURISDICTION

The judgment of the Supreme Court of Michigan dismissing the writ of habeas corpus was entered May 16, 1947. Petition for writ of certiorari was granted by this Court on October 13, 1947. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended, U. S. C., Title 28, Sec. 344(b).

QUESTION PRESENTED

Whether, consistent with the due process clause of the Fourteenth Amendment, a county judge, sitting in secret session pursuant to the Michigan "one-man grand jury" statute, may summarily convict and sentence a witness for contempt for giving "false and evasive" testimony although the alleged misconduct is neither self-evident, committed "in the presence of the court," nor supported by evidence.

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*This and subsequent references are to the record filed in the court below and refiled in this Court.

STATUTE INVOLVED

The provisions of the Michigan "one-man grand jury" statute, C. L. 1929, § 17217-17220, Mich. Stats. Ann. §§28.942-28.945, are set forth in Appendix A, *infra*, p. 34.

STATEMENT

Proceedings before "one-man grand juror."—Petitioner William Oliver, an owner and operator of pin ball machines in Oakland County, Michigan, was summoned to appear September 11, 1946 before Honorable George B. Hartrick, one of three circuit judges for Oakland County. At such time Judge Hartrick, pursuant to C. L. 1929, § 17217, *et seq.*, Mich. Stats. Ann., § 28.942, *et seq.*, was conducting a so-called "one-man grand jury" investigation "concerning violations * * * such as gambling, operation of gambling devices, bribery of public officers and other crimes enumerated in a petition" previously filed (R. 8). In obedience to a subpoena (R. 9), petitioner appeared before Judge Hartrick and the two other circuit judges of Oakland County who were described as sitting with him "in an advisory capacity."[1] Petitioner, who had been interrogated in the same investigation six months earlier (R. 17), was then questioned at considerable length in a secret session of the "grand jury."

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[1] C. L. 1929, §13666, Mich. Stats. Ann., §27.188, to which Judge Hartrick refers in his answer (R. 8), provides that in counties where there are two judges, they may both sit together "in the hearing of trials, or causes, or on all questions coming before them * * *" The statute does not in terms prescribe a procedure for counties, such as Oakland, where there are three circuit judges.

According to the selectively condensed testimony of petitioner which is set forth in the "answer" of the "grand juror" to the writ of habeas corpus (R. 10-14), petitioner was the owner and operator of pin ball machines in Oakland County (R. 10); the machines were "perfectly legal" but could be used for gambling purposes (R. 12). In September 1944 one C. E. Mitchell, doing business under the name of Midwest Bonding Company (R. 9), approached petitioner and induced him to buy certain "bonds" which purported to guarantee reimbursement to the county for "extra" expenses (R. 13) of prosecuting persons using the pin ball machines for gambling purposes (R. 12). Petitioner admitted that he had discussed the project with other operations of pin ball machines (R. 13), that he did not know who was to be prevented from misusing the machines (R. 12), and that he "didn't think anything special" about a stranger making "a contract for the county" (R. 13). He admitted he did not discuss the "bonds" with an attorney, but stated that he bought them because he thought this would demonstrate his good faith and desire to operate his machines in a legitimate manner (R. 14). Petitioner did not have the "bonds" in his possession; he stated he was unable definitely to tell the exact date on which he destroyed the bonds (R. 10) although he destroyed them at the end of the year in which they had expired (R. 11). He acknowledged that he had never previously had such bonds in his possession and that the destruction of such bonds was "an event" which had never previously befallen him in his lifetime (R. 11). Despite repeated questions on the subject, he was unable to state how he destroyed the bonds but indicated that he "probably threw them in the trash can" since that was his usual method of disposing of unwanted papers (R. 11).

The portions of the petitioner's testimony included in the record do not indicate that he refused to answer any

question; he did not assert persistent forgetfulness of events within his obvious knowledge: he does not appear to have been insolent in his manner or contumacious in his replies. At the conclusion of his interrogation, however, petitioner was told by the "grand juror" (R. 14):

> "Because the story doesn't, if you want it put in language you understand, doesn't jell and we believe that, I think we all believe, that I believe that, and Judge Holland here, is my associate, although I am technically the Grand Juror, we more or less like to have in cases of this kind, at least the advice of other reasonable persons to see whether or not we are jumping at wild conclusions. I don't think any one person who reads your testimony, could believe this story. I don't believe my associates do * * *"

After which Judge Hartrick asked each of his associates, Judge Holland and Judge Doty, if they could believe petitioner's story; each replied with a laconic "no" (R. 14).

Due to the sudden illness of the "grand juror" (R. 10), there was insufficient time to prepare an order adjudging petitioner guilty of contempt until September 14, 1946 (R. 10), three days after petitioner was taken into custody (R. 2-3). In this "judgment and sentence" (R. 15, 16), the grand juror indicated that petitioner was interrogated by him while under oath; that he answered the questions "evasively," and that he "repeatedly gave contradictory answers to the same questions concerning matters material to the inquiry * * *" (R. 16).

Proceedings below.—On September 14, 1946, a petition for a writ of habeas corpus and ancillary writ of certiorari was filed in the court below in behalf of petitioner by his attorney (R. 2) who alleged that he had been denied opportunity to confer with petitioner who was in custody although no order of commitment had yet been entered (R. 6). The writs were issued the same day (R. 5).

In his answer, the grand juror asserted (R. 9) that petitioner

> "gave false and evasive answers concerning the status of the whereabouts of the said bonds as follows:
>
> (a) That the said William D. Oliver testified that he had destroyed the said bonds.
>
> (b) That the said William D. Oliver gave false and evasive answers as to the method employed by him in destroying said bonds.
>
> (c) That the said William D. Oliver impeded the progress of the Grand Jury by refusing to give information which would enable the Grand Jury to discover said bonds."

Thereafter, petitioner moved the court below (R. 17) to enter an order requiring production of the entire testimony of petitioner before the "grand jury," contending that such testimony would reveal that he had identified a copy of the "bond" which he had purchased from Mitchell and that he "had no purpose in failing to produce" the "bond" if it were in existence "or in falsifying as to the circumstances of its disposal." This motion was supported by petitioner's affidavit which was never refuted, although in the answer of the "grand juror" it was claimed that revelation of any more of petitioner's testimony would "seriously retard" the activities of the investigation (R. 18). The Supreme Court of Michigan denied the motion (R. 19).

After hearing on the petition and the return of Judge Hartrick, the writ was dismissed by an equally divided court. Four justices concluded that petitioner was properly punished for contempt, rejecting the contention that he was not accorded the protection assured by the "due process" provisions of the Federal and State Constitutions, for reasons set out in a related case, *In re Hartley*,

317 Mich. 441 (1947). It was also emphasized in the prevailing opinion that the court below "does not weigh the testimony but examines it to determine if there is evidence to support the finding," *In re Oliver*, 318 Mich. 7, 13 (1947), which test was here found to have been fulfilled.

On the other hand, four justices concluded that careful review of such testimony of petitioner as was included in the record "fails to disclose a single evasive answer, especially when read in connection with the whole of the quoted testimony." Recognizing that petitioner's testimony may not have been "what the examining grand juror had expected the witness would give," it was emphasized that this was scant justification for punishment for contempt, particularly when the return of the grand juror failed to indicate or identify a single statement of petitioner which was either false or evasive.

SUMMARY OF ARGUMENT

Proceedings before a "one-man grand jury" in Michigan differ radically from ordinary judicial inquiries and call for greater rather than less restraint upon the arbitrary exercise of the contempt power. Without benefit of representation by counsel, petitioner was required to testify at a secret session of the "one-man grand jury" and when his answers did not satisfy his questioners, he was jailed for contempt without notice or hearing although the record discloses no refusal to answer questions, no statement which was false, and no obstruction of the investigation. In such circumstances, petitioner's summary conviction and sentence for contempt by a "one-man grand juror" offended minimum standards of procedural fairness which Michigan is required to observe by virtue of the due process clause of the Fourteenth Amendment.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS A COUNTY JUDGE, SITTING IN SECRET SESSION PURSUANT TO THE MICHIGAN "ONE-MAN GRAND JURY" STATUTE, FROM SUMMARILY COMMITTING A WITNESS FOR CONTEMPT WHEN THE ALLEGED MISCONDUCT HAS NOT BEEN "IN THE PRESENCE OF THE COURT" AND IS NEITHER SELF-EVIDENT NOR SUPPORTED BY EVIDENCE IN THE RECORD.

A. Origin and Development of the "One-Man Grand Jury" in Michigan.

The case at bar appears to present the first occasion in which this Court has undertaken to review a controversy arising out of proceedings pursuant to the so-called "one-man grand jury" statute of the State of Michigan, C. L. 1929, § 17217, *et seq.*, Mich. Stats. Ann., § 28.942, *et seq.* Although this legislation is not unparalleled, it is in Michigan that the "one-man grand jury" has been most frequently and sensationally employed as an important instrument in the administration of criminal justice. The contempt power, as the instant case confirms, is much more than a casual incident of "one-man grand jury" investigations to be availed of in infrequent and abnormal situations to safeguard the integrity and dignity of the proceedings; rather, the power to punish for contempt has been an essential element of this singular investigative process, an ingredient indispensable to its effectiveness as well as a fertile source of abuse. Before considering constitutional limitations upon summary and arbitrary assertion of the contempt power in such proceedings, it, accordingly, seems appropriate to review the nature and development of the "one-man grand jury" system itself.

In 1916 a special committee on criminal law and procedure of the Michigan State Bar Association submitted a report to that organization which deplored the lack of effective statutory instrumentalities for the discovery of crime in a state where the common law grand jury had fallen into disuse.[2] To meet what was considered to be a vital procedural need, the committee submitted a draft of a proposed act authorizing judicial investigations of crime. This was presented to the Michigan Legislature under the sponsorship of the State Bar Association and, with slight modifications, it became in the following year the basic one-man grand jury statute.[3]

It was observed in the committee's report that the proposed act was patterned in large measure after an earlier Michigan statute which granted investigative powers to Detroit police judges, P. A. 1885, Act 161, Sec. 20. The analogy between such investigative functions and those of coroners seems to have been tacitly assumed:

> "In his History of the Criminal Law of England, Sir James Fitz James Stephen says: 'It is singular that with the law as to coroners in full operation since 1276, no duties of the same sort should have been imposed on the justices of the peace appointed forty-eight years afterwards in 1324.' It is no less singular that in our present Michigan statutes under the head of 'Proceedings for the Discovery of Crime' the sole provisions relate to Coroners' Inquests.'"[4]

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[2] The report is contained in Proceedings of the Twenty-Sixth Annual Meeting, The Michigan State Bar Association, 101-105 (1916). See also Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 138-139 (1945).

[3] The statute remained unchanged until 1947 when it was amended to prohibit the same judge from serving as grand juror and as examining magistrate at the preliminary examination of one whom he had indicted. House Enrolled Act, No. 31, 64th Legislature, Reg. Sess., 1947.

[4] Proceedings of the Twenty-Sixth Annual Meeting, The Michigan State Bar Association, 101-103 (1916). That portion of Stephen's work referred to is reprinted in 2 Select Essays in Anglo-American Legal History 443, 455 (1908).

Although the court below has observed that the "one-man grand jury" proceeding is in the nature of an inquest, *In re Investigation of Recount,* 270 Mich. 328, 335 (1935), it has also been suggested that the judge acts as a "conservator of the peace" whose powers are specifically recognized in Article VII, § 17 of the Michigan Constitution of 1908. See *Oakman v. Recorder of Detroit,* 207 Mich. 15, 23 (1919); *In re Slattery,* 310 Mich. 458, 465-467 (1945), *cert. den.* 325 U. S. 876. Perhaps closer historical affinity may be found to the practice under the Assize of Clarendon where royal justices were sent throughout the realm of Henry II to inquire into the commission of robberies and other misdeeds of violence,[5] and to the special inquisitions which, under Edward I, gave place to general inquisitions into offenses against the forest laws.[6]

Indeed, the techniques regularly employed in "one-man grand jury" investigations have more than superficial resemblance to those of the French *juges d'instruction* under the inquisitorial system of the Continent. *Garner, "Criminal Procedure in France,"* 25 Yale L. J. 255 (1916); *Willoughby, Principles of Judicial Administration,* 195-208 (1929). See also *State v. Smith,* 56 S. D. 238, (1929); *State ex rel. Poach v. Sly,* 63 S. D. 162 (1934). Comparisons have also been drawn between the Michigan "one-man grand jury" statutes and much earlier legislation in a few other states.[7] Whatever common trends may be dis-

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[5] See Maitland, Constitutional History 109-110 (1910), quoted in Willoughby, Principles of Judicial Administration 175 (1929).

[6] See 1 Holdsworth's History of English Law 98 (3rd ed., 1922).

[7] Comparable legislation is discussed in Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc., 137, 139-140 (1945) which is perhaps the most informative article on the Michigan system. See also "A Genuinely Efficient Grand Jury Inquest," 26 J. Am. Jud. Soc. 79 (1942). Other references to the operation of the "one-man grand jury" are found in Gallagher, "The One-Man Grand Jury—A Reply," 29 J. Am. Jud.

cernible to the historian of legal institutions, the Michigan statute has been viewed and applied in large measure as an autochthonous grant to elected judges of extraordinary powers to act simultaneously as detectives, magistrates, and twenty-three man grand juries.

Designed by its framers to be used in "probing frauds, conspiracies and the more insidious forms of violations of law, with which the ordinary police organization is usually powerless to deal,"[8] the "one-man grand jury" statute has been repeatedly employed during the three decades of its existence in cases which have engendered great public interest and excitement because of the prominence or notoriety of the participants, the surcharged political atmosphere of the investigation, the cinematic character and scope of the suspected offenses or other factors which not only appeal dramatically to public opinion but which may also be assumed to have an inescapable if immeasurable effect upon judicial perspectives.

Thus, the first case submitted to the court below in which a "one-man grand jury" investigation had been conducted was a criminal conviction of a township supervisor for keeping fraudulent official records. *People v. Wilson,* 205 Mich. 28 (1919). Thereafter, cases arose involving charges of graft in the affairs of the Detroit board of water commissioners, *Oakman v. Recorder of Detroit,* 207 Mich. 15 (1919); malfeasance of the mayor of Bay City, *Mundy v. McDonald,* 216 Mich. 444 (1921); and restraint

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(footnote continued)

Soc. 20 (1945); Marsh, "Michigan's One-Man Grand Jury," 8 J. Am. Jud. Soc. 121 (1924); Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 Yale L. J. 687, 689-692 (1932); Reports of the Special Committee to Study and Report Upon the One-Man Grand Jury Law, State Bar of Michigan, 26 Mich. St. B. J. 55 (1947).

[8] Proceedings of the Twenty-Sixth Annual Meeting, The Michigan State Bar Association 101, 104 (1916).

of trade by a large group of Detroit commission merchants, *People v. Butler*, 221 Mich. 626 (1923).[9] The celebrated investigation of the House of David in Benton Harbor produced the first division in the court below on the exercise of the contempt power by "one-man grand jurors." *People v. Doe*, 226 Mich. 5 (1924). See also *Hansel v. Purnell*, 1 F. (2d) 266 (C. C. A. 6th, 1924), for a history of the investigation.[10]

Widespread investigations of attempted election frauds were later made in Detroit pursuant to the "one-man grand jury" statute, *In re Investigation of Recount*, 270 Mich. 328 (1935) and resulted in the conviction of a numbero of political figures, *People v. O'Hara*, 278 Mich. 281 (1936). See also *In re Wilkowski*, 270 Mich 687 (1935). False testimony in a one-man grand jury investigation of activities of the Black Legion in Genesee County gave rise to a conviction for perjury which also was affirmed by an equally divided court. *People v. St. John*, 284 Mich. 24 (1938).

It was under the vigorous influence of then Wayne Circuit Judge Homer Ferguson that the one-man grand jury reached its climactic flowering in 1939-1942. Armed with a large staff of investigators, accountants, detectives and legal counsel, continuing its investigations over years, the "one-man grand jury" ranged from examining professional racketeering and Purple Gangsterism to corruption in the highest public offices in the City of Detroit and in Wayne County. Convictions were many and impressive

[9] The *Butler* case is discussed by the trial judge in Marsh, "Michigan's One-Man Grand Jury," 8 J. Am. Jud. Soc. 121 (1924) which also reviews other instances of use of the one-man grand jury in Detroit.

[10] This and other one-man grand jury investigations are discussed in Winters, "The One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 141-143 (1945).

and the "law of one-man grand juries" grew apace.[11] Later important investigations have been initiated to deal with corruption in the State government and to investigate "labor rackets."[12]

If cases arising from such important and widespread investigations do not tend to make "bad law," they have at least tended to obscure close analysis of the powers and limitations upon the powers of judges conducting "one-man grand jury" inquiries. Where guilt has been established by a jury, frequently after long and expensive trials, convicted appellants have been told that their objections are baseless or that irregularities are harmless

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[11] The following cases arose from this investigation: *In re Watson*, 293 Mich. 263 (1940); *In re Schnitzer*, 295 Mich. 736 (1940); *In re Ward*, 295 Mich. 742 (1940); *In re Cohen*, 295 Mich. 748 (1940); *People v. Ewald*, 302 Mich. 31 (1942); *People v. McCrea*, 303 Mich. 213 (1942); *cert. den.*, 318 U. S. 783; *People v. Wilcox*, 303 Mich. 287 (1942); *People v. Malone*, 303 Mich. 297 (1942); *People v. Staebler*, 303 Mich. 298 (1942); *People v. Stambaugh*, 303 Mich. 300 (1942); *People v. Way*, 303 Mich. 303 (1942); *People v. Scaduto*, 303 Mich. 307 (1942); *People v. Garska*, 303 Mich. 313 (1942); *People v. Kent*, 304 Mich. 148 (1943); *People v. Robinson*, 306 Mich. 167 (1943); *People v. Millman*, 306 Mich. 182 (1943); *People v. Roxborough*, 307 Mich. 575 (1943); *People v. Watson*, 307 Mich. 596 (1943); *People v. Ryan*, 307 Mich. 610 (1943); *People v. Reading*, 307 Mich. 616 (1943); *People v. Ryckman*, 307 Mich. 631 (1943); *Aller v. Detroit Police Dept. Trial Board*, 309 Mich. 382 (1944); *People v. Woodson*, 309 Mich. 391 (1944); *People v. Norwood*, 312 Mich. 266 (1945); *People v. Heidt*, 312 Mich. 629 (1945); *People v. Bartlett*, 312 Mich. 648 (1945); *People v. Clark*, 312 Mich. 665 (1945). See also "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (1942).

[12] In the first of these investigations Ingham Circuit Judge Carr served as grand juror and Kim Sigler acted as special prosecutor. The former is now chief justice of the court below and the latter is governor of Michigan. See, for cases proceeding from this investigation, *In re Slattery*, 310 Mich. 458 (1945), cert. den., 325 U. S. 876; *Kloka v. State Treasurer*, 318 Mich. 87 (1947); See also *Hemans v. U. S.*, 163 F. (2d) 228 (CCA 6th, 1947). *People v. DenUyl*, 318 Mich. 645 (1947). The single reported case arising from the "labor rackets one-man grand jury" conducted by Wayne Circuit Judge George B. Murphy is *People v. Hoffa*, 318 Mich. 656 (1947).

and non-prejudicial. See, e. g. *People v. McCrea*, 303 Mich. 213 (1942), *cert. den.*, 318 U. S. 783; *People v. Stambaugh*, 303 Mich. 300 (1942); *People v. Wilcox*, 303 Mich. 287, 296 (1942). This has resolved particular cases to the satisfaction of some segments of the public and press, but it has left in confusion the essential character of the "grand jury" proceeding.

In an early case the court below cautiously referred to such an investigation as a judicial proceeding for the discovery of crime in which the judge acted "either as a conservator of the peace or in the exercise of powers analogous to those possessed by grand juries." *Oakman v. Recorder of Detroit*, 207 Mich. 15, 23 (1919). There a "presentment" of the judge, filed before any warrant was issued and containing serious charges against a public officer, was stricken from the files of the court of which the grand juror was a member, it being held that such public disclosure was inconsistent with the obligation of secrecy imposed upon grand jurors.

Yet, when it was sought in a similar situation to recover for damages for libelous statements contained in the publicized "findings" of a "one-man grand juror," it was held that judicial immunity barred recovery since the grand juror was acting throughout "as circuit judge." *Mundy v. McDonald*, 216 Mich. 444 (1921). In *People v. Doe*, 226 Mich. 5 (1924) the inquiry was referred to both as a "John Doe proceeding" (p. 6) and as an "investigation by a judge sitting as a grand jury" (p. 8). In *People v. St. John*, 284 Mich. 24, 33-34 (1938), four members of the court below took occasion to observe:

> "It is somewhat of a misnomer to term the proceedings a 'one-man grand jury,' for it is special and does not confer the general powers of a grand jury. The statute provides for a special investiga-

> tion under a complaint of the commission of an alleged crime; it does not authorize a grand inquest, with power of roving inquiry and presentment of offenders generally. When the statutory authority is properly invoked it operates in a specific instance as an aid toward bringing criminal offenders to trial."

Nevertheless, the court later indicated that despite such objection, the term "one-man grand jury" is aptly descriptive of the function performed and would continue to be officially employed. *In re Slattery*, 310 Mich. 458, 461 (1945), *cert. den.* 325 U. S. 826. In fact, the court below has regarded the investigating judge as so much a "grand juror," that it has held applicable to him a century-old statute covering "members of the grand jury."[13]

While the judge, exercising the "broad investigatorial powers" of a grand jury, *United States v. Johnson*, 319 U. S. 503, 510, is thus free to inquire into offenses concerning which no specific charges have been filed, *People v. St. John*, 284 Mich. 24, 28 (1938), or to issue a warrant covering a crime subject to the exclusive jurisdiction of another

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[13] C. L. 1929, §17233, Mich. Stats. Ann., §28.959, provides that "Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court * * *." In upholding convictions following "'one-man grand jury" investigations, the court below has pointed out that because the statute permits interrogation of the "one-man grand juror" the defendants could have taken this means to compensate for denial to them of the right to cross-examine witnesses as to their testimony before the "grand jury." *People v. McCrea*, 303 Mich. 213, 244-246 (1942), *cert. den.* 318 U. S. 783; *People v. Butler*, 221 Mich. 626, 630-631 (1928). Cf. also *People v. Norwood*, 312 Mich. 266, 274 (1945); *People v. Karoll*, 315 Mich. 423, 431 (1946). On the other hand, C. L. 1929, §17231, Mich. Stats. Ann. §28.957, which contemplates that the work of a grand jury shall be performed during a single term of court, has never been applied to limit "'one-man grand jury" investigations which, as in the instant case, have extended over more than twelve terms of court. Cf. *United States v. Johnson*, 319 U. S. 503.

court, *People v. Ewald,* 302 Mich. 31, 39-40 (1942), *In re Hickerson,* 301 Mich. 278, 281-282 (1942), or which has been committed outside of the territorial jurisdiction of the circuit court of which the judge is a member, *McComb v. City Council of City of Lansing,* 264 Mich. 609, 612 (1933), the logical conclusion that the judge is performing other than his regular judicial functions may not, it seems, be indulged. The contention that the statute confers upon judges responsibilities which are not judicial, cf. *Matter of Richardson,* 247 N. Y. 401 (1928), has been repeatedly rejected. *In re Slattery,* 310 Mich. 458, 466-468 (1945), *cert. den.* 325 U. S. 876; *Kloka v. State Treasurer,* 318 Mich. 87, 90 (1947). The judge conducting such an inquiry, the court asserted somewhat archly in the *Slattery* case (p. 466), is "neither a prosecuting attorney, policeman or detective."

The force of this conclusion has hardly been augmented by repetition. Although the "one-man grand juror" is not to be denominated a "prosecutor," he is still free to summon a suspect or a witness in the middle of the night,[14] bring him to a private meeting place or "hide-out" far from any courtroom,[15] hold him incommunicado,[16] refrain

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[14] This practice is admittedly common. See report of Special Committee to Study and Report Upon the One-Man Grand Jury Law, 26 Mich. St. B. J. 55, 60 (1947).

[15] The Ferguson "grand jury" had as many as two such "hide-outs" in addition to a secret suite in a large Detroit office building. Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 143 (1945). Taking testimony of witnesses in their private homes, at the residences of staff members or in hotel rooms, the investigation became known as the "portable grand jury." "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (1942).

[16] It has frequently been contended that persons have been kept in custody by one-man grand juries without warrant or the filing of charges against them and prevented from communicating with counsel or their families for long periods. In fact, the use of third degree methods has also been alleged. It does not appear that such charges have been considered in any reported opinion of the court below.

from advising him of his privilege against self-incrimination, *People v. Butler*, 221 Mich. 626, 631-632 (1933), and interrogate him on any subject whatever, *People v. Wolfson*, 262 Mich. 409, 413 (1933); *In re Watson*, 293 Mich. 263, 269 (1940), in secret session and in the absence of counsel. The judge is no mere passive "referee" in such proceedings but furnishes active and controlling leadership. He may proceed with an investigation even when the county prosecutor and the state attorney-general fail or refuse to participate, *In re Investigation of Recount*, 270 Mich. 328, 331 (1935), and he is not bound by statutory restrictions upon the issuance of warrants without the recommendation of the prosecuting attorney of the county.[17] Likewise, although he is not a prosecutor, policeman or detective, he is free to employ such assistants as he may desire, *In re Investigation of Recount*, 270 Mich. 328, 331 (1935), and maintain staffs of investigators, special prosecutors police officers and other aides at public expense, *In re Slattery*, 310 Mich. 458, 479 (1945), *cert. den.* 325 U. S. 876,[18] who are regularly present at secret grand jury sessions. Nor has it been felt by "one-man grand

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[17] C. L. 1929, §17135, Mich. Stats. Ann., §28.860 prohibits circuit judges from issuing a warrant "until an order in writing is filed with such public officials and signed by the prosecuting attorney for the county, or unless security for costs shall have been filed with said public officials." In *People v. O'Hara*, 278 Mich. 281, 293 (1936) the statute was held inapplicable to "one-man grand jury" proceedings, the court adding that "in any event the claimed irregularity [issuance of warrant without order from prosecutor or posting of security for costs] was not jurisdictional."

[18] The following expenditures of the "$100,000 labor rackets one-man grand jury" of Wayne County are indicative of the proportions which such investigations have assumed. Irrespective of services furnished by regular law enforcement officers assigned to the investigation, the grand jury reported that its chief "special assistant attorney general" received a salary for an eleven-month period of $25,562.50, three assistants received a total of $17,545.42, plane, railroad, taxicab, garage rental, parking and other transportation expenses aggregated $9,424.43 and "meals" and "hotel" charges exceeded $5,000 of more than $95,000 admittedly

jurors" that they are bound by normal standards of judicial reticence when conducting such inquiries. Even the most ardent champions of the Michigan system acknowledge that "the criticism is sometimes heard that the judge so acting makes himself a newspaper hero for political purposes." "Improvements on Grand Jury Procedure," 28 J. Am. Jud. Soc. 46 (1934). This criticism has recently resounded with "echoing impressiveness."[19]

Because the contours of this investigative process, despite thirty years of experience with the Michigan statute, remain so ill-defined, it is easily understood why the system can mean "all things to all men." Its partisans emphasize vehemently its efficiency and effectiveness in uprooting crime,[20] while its opponents see it as an anomaly

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(footnote continued)

spent. Detroit Free Press, May 28, 1947; Detroit Times, May 27, 1947; Detroit News, May 27, 1947. Other similar investigations have pridefully reported that they have been "self-supporting" in that fines for convictions and contempts have equalled or exceeded the costs of the inquiry. *Cf. Tumey v. Ohio*, 273 U. S. 510.

[19] The indiscriminate issuance of press releases, interviews, threatening or self-gratulatory statements and other publicity by "one-man grand juries" has become so common that it was expresly condemned by the special committee of the State Bar of Michigan which recently reexamined the system which its predecessor organization had introduced. Report of Special Committee to Study and Report Upon the "One-Man Grand Jury Law," 26 Mich. St. B. J. 55, 62 (1947). The attorney-general of Michigan has also charged one grand juror with issuing indictments without foundation or "evidence to back them up" to gain publicity for his campaign for re-election as circuit judge. Detroit News, p. 2, col. 1, June 16, 1947.

[20] The Detroit Citizens League has from time to time rendered enthusiastic support to these inquiries. See an article by its late president, Lovett, "One-Man Grand Jury in Action," 33 Nat'l. Munic. Rev. 292 (1944). The American Judicature Society as early as 1920 asserted that Michigan had "solved the grand jury problem satisfactorily." "Grand Jury Reform," 4 J. Am. Jud. Soc. 77, 81 (1920). See also "Improvements on Grand Jury Procedure," 28 J. Am. Jud. Soc. 36 (1934); "Grand Jury Encumbers Justice in Many States," 23 J. Am. Jud. Soc. 25, 26 (1939); "Unprecedented Success in Criminal Courts," 26 J. Am. Jud. Soc. 42 (1942).

which attains "results" only at the expense of constitutional liberties.[21] The court below has given few express clues as to how the system may be safeguarded without sacrifice of civil rights; investigation fails to disclose a single case involving any phase of grand jury activity sanctioned in a lower court, which has been reversed in the Supreme Court of Michigan. On the contrary, the single amendment to the basic statute was passed after the repeated refusal by the court to require "one-man grand jurors" who had issued indictments to disqualify themselves at the preliminary examination of the accused from passing upon the sufficiency of such indictments or the evidence upon which they were predicated.[22]

B. Role of the Contempt Power.

While the court below has been equally reluctant to announce any limitations upon "one-man grand juries" in their exercise of traditional judicial powers to punish for contempt, this power—in fact or *in terrorem*—is the fulcrum of the entire investigative process. A witness is called in response to a subpoena, put upon his oath, and warned that refusal to testify will expose him to summary punishment for contempt, and that false or evasive answers will receive similar treatment. Deprived of the protection of counsel, frequently interrogated in a hostile

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[21] See the opinion of Professor Edson R. Sunderland that the grand juror's functions are "inconsistent with the impartiality which ought to characterize the judicial office," and other critical remarks collected in Winters, "The One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 146 (1945). To the same effect is Gallagher, "The One-Man Grand Jury—a Reply," 29 J. Am. Jud. Soc. 20 (1945).

[22] See *People v. McCrea*, 303 Mich. 213, 248-249 (1942), *cert. den.* 318 U. S. 783; *People v. Roxborough*, 307 Mich. 575, 580 (1943), now obsolete by reason of House Enrolled Act No. 31, 64th Legislature, Reg. Sess., 1947.

atmosphere and under the least favorable of conditions, and no less frequently ignorant of the privilege against self-incrimination, the witness is placed in a "vise" from which release is difficult.[23] Any rights he may conceive he has at such *in camera* sessions can only be protected by defiance of the "one-man grand juror" and exposure to the very consequences which it is sought to avoid. Even when the witness maintains his position, suffers sentence for contempt, and prosecutes review upon application for extraordinary writs, he is confronted with carefully selected portions of the transcript of the grand jury proceedings set out in the return of the officer whose decision has been challenged,[24] and is called upon to establish to the satisfaction of the court below that there is no "competent evidence," *People v. Wolfson*, 264 Mich. 409, 414 (1933), or no "evidence to support the finding" of the grand juror. *In re Oliver*, 318 Mich. 7, 13 (1947); *People v. Doe*, 226 Mich. 5, 11-12 (1924).

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[23] See Winters, "The Michigan One-Man Grand Jury," 28 J. Am. Jud. Soc. 137, 148 (1945). This was corroborated by Hon. George B. Murphy, "'labor rackets one-man grand juror,' testifying as a witness in *People v. Kopek, et al.*, No. 24616, Wayne Circuit Court, who stated that it was his regular practice to indicate the penalties for contemptuous refusal to answer questions, evasiveness or false testimony but not to inform witnesses (including those against whom the investigation was directed) that they had a constitutional privilege to withhold information which could spell their own doom in the criminal courts.

[24] See *In re Slattery*, 310 Mich. 458, 463 (1945), *cert. den.* 325 U. S. 876, where the return of the grand juror, as in the instant case, did not set forth the entire testimony of the witness but only selected portions. The court there observed that this was "obviously" justified by the secret nature of the proceedings. Yet, in *People v. Karoll*, 315 Mich. 428, 431 (1946) the unfairness to a defendant of being forced to face "isolated" portions of his testimony was recognized and regarded as prejudicial. The opinions below do not advert to the question here. The record before the "grand juror" is subject to his control in any event; it has been charged in unchallenged affidavits in two pending lower court cases that "the labor-rackets one-man grand jury" frequently interrogated witnesses "off the record" and barred the official stenographer from vital parts of the proceedings. *People v. Kopek, et al.*, No. 24616, Wayne Circuit Court; *People v. Carroll*, No. A 48038, Detroit Recorder's Court.

Refusal of a witness to answer a question put by a grand juror is regarded as contemptuous even when based upon a misapprehension of the precise limits of constitutional privilege or the scope of statutory immunity.[25] The language of the grand jury statute is also available to authorize punishment for contempt when a witness refuses to respond to a subpoena.[26] But though the statute enumerates no other grounds for summary contempt citations by grand jurors, the court below has, upon general notions of the common law, extended the contempt powers of grand jurors to punish "evasive" conduct[27] and false swearing.[28] "Coufts should not be trifled with," it has declared; since refusal to answer a proper question is contemptuous, "the refusal to answer truthfully imports greater moral turpitude and should likewise be held to be contempt." *People v. Doe*, 226 Mich. 5, 17 (1924). Punishment of such conduct, *ergo*, is said to be a traditional prerogative available to a grand juror because he is a "judicial" officer.

The procedure to be observed in thus "vindicating" the authority of a "grand juror" is sufficiently flexible to permit consistent affirmance of every "one-man grand jury" commitment for contempt. Thus while a state senator's

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[25] *In re Watson*, 293 Mich. 263 (1940); *In re Schnitzer*, 295 Mich. 736 (1940); *In re Ward*, 295 Mich. 742 (1940); *In re Cohen*, 295 Mich. 748 (1940). See also *Matter of Bommarito*, 270 Mich. 455 (1935).

[26] *In re Wilkowski*, 270 Mich. 687 (1935). The "grand jury" statute authorizes sentences for contempt to secure obedience when the witness neglects or refuses to appear to answer any question on a matter deemed material to the inquiry. C. L. 17219, Mich. Stats. Ann., §28.944.

[27] *In re Slattery*, 310 Mich. 458 (1945), *cert. den.*, 325 U. S. 876; *In re Hartley*, 317 Mich. 441 (1947).

[28] *People v. Doe*, 226 Mich. 5 (1924); *People v. Wolfson*, 264 Mich. 409 (1933). False testimony before a "one-man grand juror" is also the basis of a criminal prosecution for perjury. *People v. St. John*, 284 Mich. 24 (1938).

refusal to appear as a witness is a "criminal" contempt of the grand jury rather than a "civil proceeding" in which legislative immunity may be asserted, *In re Wilkowski,* 270 Mich. 687 (1935), a proceeding against a witness for giving false answers to a grand juror may not be regarded as "criminal" for then, the court has said, the witness would be entitled to a trial by jury before being jailed for sixty days. *People v. Doe,* 226 Mich. 6, 18 (1924). If the judge sentences a witness for "contempt of court" in his capacity as a "grand juror" presiding over a secret investigation, the regularity of the procedure is no more doubted than when the judge meticulously avoids exercising the contempt power as "grand juror" and convenes a "circuit court" for the purpose of imposing sentence. Two years ago it was observed, *In re Slattery,* 310 Mich. 458, 479 (1945), *cert. den.,* 325 U. S. 876:

> "It was proper for Judge Carr to make the order finding petitioner guilty of contempt, not as a one-man jury but as a circuit judge. It would have been an idle gesture for him to have the record of a case in which he had sat, first written up and then submitted to himself."

More recently, however, *In re Hartley,* 317 Mich 441, 444 (1947), a case related to the present one, which involved a fellow pinball operator in Oakland County, the prevailing opinion of the court below indicated:

> "While, in the *Slattery Case,* the judge adjourned the one-man grand jury proceeding and then reconvened as a circuit court before adjudging the witness guilty of contempt, in effect he was still acting as a grand jury. He made an adjudication based on his personal knowledge of what had transpired before him as a one-man grand jury. No record of the pertinent grand jury proceedings was transcribed and presented to him as a circuit judge.

> That, we held, would have been an idle gesture. It would be an equally idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one-man grand jury, may in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith."

By reason of these definitive interpretations of the Michigan statute by the Supreme Court of Michigan, the "one-man grand juror" must be recognized as a justice of the peace, police judge or judge of a court of record" who is empowered to direct comprehensive crime-detection enterprises behind closed doors, peremptorily to summon and interrogate witnesses on any subject deemed pertinent to the investigation of any criminal offense, without permitting such witness to be represented by counsel, and simultaneously to exercise the broadest powers of contempt historically limited to judicial officers conducting purely judicial proceedings. Distinctions between acts of a judge as "grand juror" and as a member of a duly constituted court are, under these decisions, to be dismissed as "idle" and irrelevant. So construed, the statute is presented to this Court for measurement in the light of the beneficent exactions of the Fourteenth Amendment.

C. Violation of Due Process.

In the case at bar, petitioner was sentenced to the Oakland County Jail for two months without notice or hearing, save as these basic requirements of procedural due process may have been fulfilled by the oral anouncement of the "grand juror" that in his opinion petitioner's testimoy "doesn't jell" (R. 14), and that it was, accordingly, unworthy of belief. Petitioner was not informed of the nature of the charges against him save as the grand

juror indicated to his jailer that he had answered questions "evasively" (R. 16) and to the court below that petitioner had given "false and evasive answers concerning the status of the whereabouts" of the bonds (R. 9). The "falsity" of any answers was never proved and their evasiveness was found by the prevailing four members at the court below to be supported by "evidence" inherent in the answers themselves. Petitioner never received a trial by jury nor, indeed, an opportunity before he was jailed to present his position through an attorney at an open session of a competent court of the state. Rather, petitioner was placed in custody on September 11, 1946 and remained there for three days before the sheriff was advised of the reason for his detention (R. 15) after proceedings had been instituted to secure his release (R. 2-3).

The grand juror contended in his answer that petitioner's statement that he had destroyed the "bonds" he admitted buying from Mitchell was false (R. 3), although upon the record this assertion never rises above the level of his own subjective suspicion. What is more, petitioner's unchallenged affidavit indicates that he identified a duplicate of the "bond" purchased from Mitchell (R. 17) in the course of his testimony before the "grand jury." If the "grand jury" had a duplicate of the document, it is difficult to see how petitioner "impeded the progress" of the "grand jury" by refusing information "which would enable the Grand Jury to discover said bonds," as the "grand juror" charged (R. 3). The "grand juror's" return does not complain of insolent replies by petitioner, protestations of forgetfulness or lack of familiarity with the obvious. Petitioner, it is true, was unable in September, 1946 to recall with the certitude demanded by his interrogators, how he had disposed of documents purchased in September 1944 when they expired at the end of the year (R. 10-11).

This, presumably, was the basis of the claim in the order of commitment that petitioner "repeatedly gave contradictory answers to the same questions" (R. 16). When petitioner was first asked what method he had used to destroy the bonds which he had said he saw no need to preserve after they had expired (R. 11), he stated "Well, I don't know off-hand just what I did do with them, whether I burned them or threw them out. I must have threw them out" (R. 11). When this portentous subject was pursued a moment later by the grand juror, petitioner answered, "I just got rid of them. I imagine I threw them into the waste paper basket. That is what I usually do. I get lots of circulations, papers, things that I have no use whatever for, threw them in the waste paper basket" (R. 11). Finally, a moment later, upon the third relentless effort, the questioner elicited this reply, "The only—I couldn't say what I did do. Probably threw them in the trash can" (R. 11).

This testimony demonstrates that petitioner lacked both fanatic curiosity and mnemonic concern for the techniques of waste paper disposal, but it can hardly provide serious justification for a summary commitment to jail for two months. Where a witness deliberately attempts to "fob off inquiry," he may be punished, a majority of the court below has held, *In re Hartley*, 317 Mich. 441, for direct contempt because the "grand juror," like the court in *United States v. Appel*, 211 Fed. 495 (S. D. N. Y., 1913), may protect itself from a "transparent sham." Petitioner's testimony was less than "transparent" to one-half of the justices of the court below.[20] In any event, aside from the

[20] "The power to punish for contempt, it was said in *United States v. McGovern*, 60 F. (2d) 880, 889 (C. C. A. 2nd, 1932), "does not reside in the court to compel a witness to testify in accord with the Court's conception of the truth." See also *Blim v. United States*, 68 F. (2d) 484, 488 (C. C. A. 7th, 1934).

ipse dixit of the "grand juror," there is nothing to justify a conclusion that petitioner's inability to reply to a series of questions on an issue which is gratuitously declared "material to such inquiry,"[30] was conduct "directly tending to interrupt" the proceedings before the grand juror or to "impair the respect due" to his authority—elements required by the general Michigan contempt statute C. L. 1929 § 13911, Mich. Stats. Ann., § 27.511, or that petitioner's conduct obstructed the grand jury in the performance of its duties—an equally indispensable ingredient of the conclusion in the *Appel* case. See *Ex Parte Hudgings*, 249 U. S. 378, 383; cf. *Clark v. United States*, 289 U. S. 1, 11.

This case comes from the court below without the protective armor of a supporting declaration of Michigan legislative policy. Cf. *Bridges v. California*, 314 U. S. 252, 260. Insofar as the Michigan legislature has spoken in its "one-man grand jury" statute, it has specifically conferred upon grand jurors the power to impose sixty-day jail sentences as punishment for contempt only when witnesses refuse to heed a properly served subpoena or when they refuse to answer a question upon a material issue. Insofar as the legislature has spoken in statutes regulating the general powers of "courts" to cite for contempt, the power has been confirmed only for courts of record—whose judges are not the only judicial officers permited to act as grand jurors. Under C. L. 1929 § 13910, Mich. Stats. Ann., § 27.511 a court of record may redress

[30] It has been suggested in some cases that even deliberately false statements may not be made punishable as contempts unless they are material to the issues in the matter before the court. *Hegelay v. State*, 24 Ohio App. 103, 108 (1927); *Gold Sign Co. v. Cosmas*, 124 Misc. (N. Y.) 877, 879 (1925); discussed *In re Gottman*, 118 F. (2d) 425, 427 (C. C. A. 2nd, 1941).

> "disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority * * * or any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings * * *."

The statute also authorizes the summary punishment of misconduct "committed in the immediate view and presence of the court by fine or imprisonment, or both, as hereinafter prescribed." C. L. 1929 § 13911, Mich. Stats. Ann., § 27.512. "In no case," it is then provided, shall such punishment by fine exceed $250 "nor the imprisonment thirty (30) days; except in those cases where the commitment shall have been for refusal to perform an act or duty which is still within the power of the party to perform." C. L. 1929 § 13939, Mich. Stats. Ann., § 27.530. For misconduct not in the "immediate view and presence of the court," the facts charged shall be presented in affidavit form, a copy thereof is to be served upon the accused who shall have "a reasonable time to enable him to make his defense." C. L. 1929, § 13912, Mich. Stats. Ann., § 27.513.

These statutes are not substantially different either in language or intention from corresponding Congressional restrictions upon the Federal courts. In such cases as *Nye v. United States*, 313 U. S. 33, this Court has emphasized that the limited power of a court to protect itself from direct, obvious and fundamental challenges to its authority cannot be used to supplant established procedures for redressing criminal acts. In fact, where the contempt power was invoked against a witness who was accused of false testimony before a federal grand jury, *In re Michael*, 326 U. S. 224, 227, it was pointed out that the exercise by federal courts of any broader contempt power than what was called "the least possible power adequate

to the end proposed" would "permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury." See also *Ex Parte Hudgings*, 249 U. S. 378, 383-384.

The prevailing opinion of the court below appears to conclude that there was evidence that petitioner was "evasive" in his replies, that such misconduct obstructed the due administration of justice, that it was in the "immediate view and presence of" a court. Of course, in reviewing state action of this kind, this Court is not bound by the factual conclusions of the state court in determining whether the alleged contemnor was denied rights to which he was entitled under the Fourteenth Amendment. *Craig v. Harney*, 331 U. S. 367, 373-374; *Pennekamp v. Florida*, 323 U. S. 331, 368. This would seem particularly true when the judgment is based not upon a deliberate legislative command but, as here, upon the same "common law concept of the most general and undefined nature" as that involved in *Bridges v. California*, 314 U. S. 252, 260. Cf. also *Cantwell v. Connecticut*, 310 U. S. 296, 308.

Unlike the defendants in the *Bridges*, *Craig* and *Pennekamp* cases, or the petitioners in *Ex Parte Hudgings*, 249 U. S. 378, and *In re Michael*, 326 U. S. 224, petitioner here did not receive even the bare opportunity to have his attorney present his position as to how such an amorphous common law concept was to be interpreted and applied to the facts disclosed by the record. The grand juror who was the object of the "contemptuous" action was also the official who passed judgment sentencing petitioner to jail for sixty days, cf. *Cooke v. United States*, 267 U. S. 517, 539, and judgment was passed and petitioner was in custody for three days before his at-

torney, who had not been allowed to confer with him (R. 3), could ascertain that no order for his commitment had been issued (R. 3). Like another victim of official Michigan overzealousness, petitioner was "hurried through unfamiliar legal proceedings without a word being said in his defense." *De Meerleer v. Michigan*, 329 U. S. 663, 665. Like De Meerleer, we believe, he was deprived of "rights essential to a fair hearing under the Federal Constitution." Cf. *Powell v. Alabama*, 287 U. S. 45, 69.

Unless a contempt has been committed "in open court," this Court has unequivocally held that "due process of law" requires that

> "the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke v. United States*, 267 U. S. 517, 537.

In the instant case, petitioner not only received no hearing before he was jailed, but in the court below his conviction was affirmed without proof of any sort that he made a single misstatement to the grand juror, without apparent consideration of the materiality to the grand jury inquiry of the questions concerning the methods petitioner used to destroy the "bonds," and after a specific denial of his motion to have all of his testimony considered (R. 19) for the purpose of showing exculpation or extenuation of the offense and mitigation of the penalty. Where the judge cannot have personal knowledge of the truth or falsity of statements made by a witness, and is informed only by the confession of the contemnor or testimony of other witnesses, an order to show cause speci-

fying the alleged misconduct must first be issued to permit the accused opportunity to be heard. See *Savin, Petitioner*, 131 U. S. 267, 277; *Ex Parte Terry*, 128 U. S. 289, 307. When the contempt charged is not of the character punishable summarily, absence of a hearing is fatal to the judgment. See *Bowles v. United States*, 44 F. (2d) 115, 188 (C. C. A. 4th, 1930)

In our view, the minimum requirements of "due process" do not countenance seductive analogies which obscure the fundamental differences between a duly constituted tribunal conducting a public trial and a judge presiding at a secret inquisitorial session behind doors barred to attorneys, newspaper reporters and curious spectators alike. The historical exception to ordinary criminal procedural requirements under which a tribunal may summarily prevent or redress disorder in the courtroom or conduct directly impairing management or control of a pending controversy at the bar of justice has been recognized for the very purpose of preserving minimum standards of "due process of law."[21] Flamboyant defiance of such a tribunal in regular open session, if allowed to go unchecked, may, indeed, result in undermining public respect and confidence in the "rule of law." But it is a defiance of the realities to assume that the same consequences ensue in a secret grand jury investigation of the type undertaken by a judge pursuant to the Michigan statute. If petitioner, at such investigation, demonstrated forgetfulness, lack of clarity in his answers or lack of sympathy for the objects of the investigation, none was to know how irritating or disrespectful his conduct was except

[21] See Radin, "Freedom of Speech and Contempt of Court," 36 Ill. L. Rev. 599, 610 (1942). Cf. also "Summary Contempt Proceedings v. The Fourteenth Amendment," 27 Va. L. Rev. 665 (1941); Nelles, "The Summary Power to Punish for Contempt," 31 Colum. L. Rev. 956 (1931).

those present in the grand juror's chambers. If petitioner was giving "false" testimony under oath, there was nothing to prevent his indictment for perjury; in such a prosecution, if his accusers could confront him with proof sufficient to establish his guilt, he faced sterner penalties than those imposed here.[22] There is nothing in the record which suggests that Judge Hartrick's investigation, which had called petitioner as a witness six months earlier (R. 17), was in danger of being impaired by reason of being "fobbed off" for the few days needed by the grand juror to recover from his illness (R. 10), to prepare specific charges against petitioner, and to order a hearing of such charges in open court at which petitioner could have been represented by an attorney of his choice.

What this record does disclose, however, is a surprising readiness upon the part of Michigan judges to commit a witness to jail because he fails to tell a story which was expected or desired of him. Such a phenomenon can hardly be viewed apart from the "grand jury" system which gives it birth. Had petitioner in this case given the identical testimony from a witness stand in response to questions of a prosecuting attorney in a public "judicial proceeding," it is unthinkable that a responsible judge would have assumed to commit him to jail because of his admitted inability to assert with confidence that he had thrown worthless papers into a waste paper basket rather than an incinerator many months before. But when the committing judge is also the interrogator, and when the

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[22] The perjury statute punishes false testimony under oath in a "court of justice" by long prison terms. Section 422 Penal Code, Mich. Stats. Ann., §28.664. This statute has been held applicable to false swearing in a "one-man grand jury" proceeding. *People v. St. John*, 284 Mich. 24 (1938). See also Section 423 Penal Code, Mich. Stats. Ann. §28.665, containing a broader definition of the crime, made punishable by a maximum fifteen year prison term.

interrogation takes place behind closed doors in a proceeding which is "*ex parte*," appeals to immemorial and inherent powers to punish for direct contempt become peculiarly contagious to the liberties of the citizen which the Fourteenth Amendment was designed to safeguard. In a state where success as a grand juror is frequently rewarded by high public office, there is a very real temptation to let prosecutive zeal in obtaining convictions obscure sensitivity to minimum standards of decency and fairness which cannot, under our system, be forsworn however inconvenient or irritating to law enforcement officials they may be. Cf. *Buchalter v. New York*, 319 U. S. 427, 429. However much the excesses of journalism may nettle the administration of justice, the absence of "free" publicity —public praise or blame—makes secret "grand jury" proceedings highly susceptible to overpersonalized judicial action. For all the difficulaties which adversary trials engender, a case such as this abundantly confirms that the presence of an attorney representing an accused serves as a "brake" upon hasty or wrathful exercise of official power. The requirement that criminal charges be sufficiently definite to be informative has an almost perfunctory significance until, in a situation worthy of Kafka, a man is sent to jail for two months for speaking "falsely" on a matter which is never identified, and for being "evasive" on a detail of behavior which, if lingeringly remembered, would suggest psychiatric rather than penal treatment.

While the states are free to determine their own legal institutions and to devise, if they can, new and more effective methods for the discovery and prosecution of crime, such ingenuity cannot transgress constitutional limits or countenance deprivation of those procedures which a long history has shown indispensable to ordered liberty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that petitioner was denied due process in being summarily adjudged guilty of contempt of a secret "one-man grand jury" and being deprived of his liberty without notice, specification of charges, opportunity to present evidence and be heard through counsel, or proof of any misconduct which would justify even a regularly constituted court in open session from imposing such drastic sanctions. Accordingly, reversal of the judgment against petitioner is prayed.

Respectfully submitted,

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APPENDIX A

The Michigan "One-Man Grand Jury" Statute

Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings. (C. L. 1929, § 17217; Mich. Stats. Ann. § 28943).

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective

or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors (C. L. 1929 § 17218; Mich. Stats. Ann. § 28.944).

Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: *Provided*, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence. (C. L. 1929, § 17219; Mich. Stats. Ann. § 28.945).

No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting

attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him (C. L. 1929, § 17220; Mich. Stats. Ann. § 28.946).